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Of Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF OREGON

KWAI FUN WONG,
 WU-WEI TIEN TAO ASSOCIATION
 and CHONG HUA SHENG MU GONG,

Plaintiffs,

vs.

DAVID BEEBE, JERRY F. GARCIA,
 JACK O'BRIEN, DOUGLAS GLOVER,
 JOHN DOES INS OFFICIALS and
 UNITED STATES OF AMERICA,

Defendants.

Civil No. CV 01-718-ST

MEMORANDUM IN OPPOSITION
 TO DEFENDANTS' MOTION
 TO DISMISS PLAINTIFFS'
 FIRST AMENDED COMPLAINT

REQUEST FOR ORAL ARGUMENT

A. INTRODUCTION

On October 17, 2001, plaintiffs filed their First Amended Complaint adding a claim for damages resulting from defendants' violations of the Religious Freedom Restoration Act, 42 USC § 2000bb (herein "RFRA"). Shortly thereafter, defendants filed a motion to dismiss the First Amended Complaint arguing that the court lacked subject matter jurisdiction and plaintiffs failed to state a claim upon which relief can be granted.

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1 Plaintiffs incorporate all facts and arguments in plaintiffs' original opposition to
 2 Defendants' Motion to Dismiss. For the following additional reasons, defendants' dismissal
 3 motion should be denied.

4 **B. RULE 12 DISMISSAL STANDARD**

5 In considering Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction
 6 which attack the face of the complaint, as opposed to relying upon extrinsic evidence, the court
 7 must consider the allegations of the complaint as true. *Gould v. Electronics Inc. v. United States*,
 8 220 F3d 169, 176 (3rd Cir 2000); *Valdez v. United States*, 837 F Supp 1065, 1067 (ED Ca 1995),
 9 *aff'd*, 56 F3d 1177 (9th Cir 1995). Such dismissals are limited to cases where the federal claim is
 10 "immaterial and made only for the purpose of obtaining federal jurisdiction" or the "claim is
 11 wholly insubstantial and frivolous." *Steel Co. v. Citizens for a Better Environment*, 523 US 83,
 12 104 (1998); *Bell v. Hood*, 327 US 678, 682-683 (1946); *Roberts v. Corrothers*, 812 F2d 1173,
 13 1177 (9th Cir 1987). A plaintiff, since she bears the burden of proving the court's subject matter
 14 jurisdiction, must be given the opportunity to discover facts supporting the jurisdictional
 15 allegations in the complaint. It is an abuse of discretion to dismiss for lack of subject matter
 16 jurisdiction without giving a plaintiff the opportunity, if requested, to conduct discovery for this
 17 purpose.¹ *Siderman de Blake v. Republic of Argentina*, 965 F2d 699, 713 (9th Cir 1992).

18 A motion to dismiss under FRCP 12(b)(6) for failure to state a claim for relief will be
 19 granted only if it appears beyond a doubt that the plaintiff cannot prove any set of facts in support
 20 of his claim entitling him to relief. *Conley v. Gibson*, 355 US 41, 45 (1957); *Allwaste, Inc. v.*
 21 *Hecht*, 65 F3d 1523, 1527 (9th Cir 1995); *Parks Sch. of Bus., Inc. v. Symington*, 51 F3d 1480,
 22 1484 (9th Cir 1995). "The issue is not whether [the] plaintiff will ultimately prevail but whether
 23 the [plaintiff] is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 US 232,
 24 236 (1974). Motions to dismiss are generally viewed with disfavor and are rarely granted. *Hall*

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 26 ¹ Plaintiffs have filed a motion to stay consideration of defendants' dismissal motion until
 they have been allowed discovery and a motion to compel discovery.

1 v. *City of Santa Barbara*, 833 F2d 1270, 1274 (9th Cir 1986); *United States v. City of Redwood*
 2 *City*, 640 F2d 963, 966 (9th Cir 1981).

3 In evaluating a motion to dismiss, the court is obligated to accept as true all material
 4 allegations in the complaint as well as the reasonable inferences that can be drawn from those
 5 allegations. *Patreto v. FDIC*, 139 F3d 696, 699 (9th Cir 1998). Before a motion to dismiss can
 6 be granted the court must determine that there are no questions of fact involved considering all
 7 evidence in the light most favorable to the party opposing the motion. *SEC v Sands*, 902 F Supp
 8 1149, 1165 (CD CA 1995); *Bank Tejarat v Varsho-Saz*, 723 F Supp 516, 517 (CD Cal 1989).

9 **C. NO GROUNDS EXIST FOR THE DISMISSAL OF PLAINTIFFS' RFRA CLAIM**

10 **1. Plaintiffs sufficiently allege that defendants' conduct violated the RFRA.**

11 RFRA applies to all federal law and prohibits the government from substantially
 12 burdening a person's exercise of religion even if the burden results from a rule of general
 13 applicability. 42 USC §§ 2000bb-1(a) and 2000bb-3(a). RFRA was enacted by Congress to
 14 enhance the level of protection given by law to the free exercise of religion. *In re Hodge*, 220
 15 BR 386, 390 (DC Idaho). The only instance where the government is allowed to substantially
 16 burden a person's free exercise of religion is when it demonstrates that the burden is (1) in
 17 furtherance of a compelling governmental interest; and (2) is the least restrictive mean of
 18 furthering that compelling governmental interest. 42 USC § 2000bb-1(b). RFRA provides for a
 19 private cause of action for those whose religious exercise has been burdened by a violation of the
 20 statute. 42 USC § 2000bb-1(c).

21 In 1997, the United States Supreme Court held RFRA was unconstitutional as applied to
 22 state and local governments, finding that Congress exceeded its authority under the Enforcement
 23 Clause 5 of the Fourteenth Amendment. *City of Boerne v. Flores*, 521 US 507 (1997). See
 24 *Sutton v. Providence St. Joseph Medical Center*, 192 F3d 826 (9th Cir 1999). However, plaintiffs
 25 are aware of no court which has held that RFRA is not constitutional as applied to the federal

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1 government, its agencies, and its officials. *See, e.g., In re Hodge, supra* at 395. Defendants do
 2 not argue to the contrary.

3 As correctly summarized by the District Court in Idaho in *In re Hodge, supra* at 390:

4 “An adherent’s free exercise of his or her religion is substantially
 5 burdened by a statute that either (1) requires the adherent to refrain
 6 from engaging in a practice important to his or her religion, *see*
 7 *Hobbie v. Unemployment Appeals Comm’n*, 480 US 136, 140-41
 8 (1987), or (2) forces the adherent to choose between following a
 9 particular religious practice or accepting the statute’s benefits. *See*
 10 *Sherbert v. Verner*, 374 US 398, 404 (1963); *Thomas v. Indiana*
Employment Sec Div, 450 US 707, 717-18 (1981). More fully
 explained, the latter type of substantial burden occurs where non-
 adherence to a religious practice is necessary to obtain a statute’s
 benefits; such a statute has an indirect coercive effect on the
 religion adherent’s free exercise. *See Thomas*, 450 US 707 at
 719.”

11 To be successful in a motion to dismiss, defendants must demonstrate that plaintiffs, with
 12 the benefit of all facts and inferences viewed in their favor, will be unable to prove any set of
 13 facts supporting their claims. *Conley, supra* at 45. Defendants are unable to make that showing.

14 Plaintiffs allege that defendants’ conduct was due to “the individual defendants’
 15 discrimination against plaintiffs because of their religious practices, beliefs and associations.” 1st
 16 Am Compl, ¶ 32. Defendant is mistaken when they represent that there is no such allegation.
 17 *See Defs’ 2nd Dism Memo*, p 4.

18 Even if defendants did not single plaintiffs out because of their religious beliefs, the
 19 RFRA claim survives a motion to dismiss. Plaintiffs allege that defendants conduct substantially
 20 burdens plaintiffs’ free exercise of religion. 1st Am Compl, ¶ 47. This is sufficient under the
 21 applicable standard to survive a motion to dismiss. Moreover, RFRA was specifically intended
 22 to apply to all neutral statutes² that may burden religious exercise, not merely statutes that were
 23 intended to interfere with religious exercise. 42 USC § 2000bb(a)(2).

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 25 ² In enacting RFRA, Congress did not make an exception for immigration laws. RFRA
 26 specifically states that its scope is without limit, i.e., it is applicable to *all* federal laws. 42 USC
 § 2000bb-3(a).

Defendants insist on going beyond the allegations into factual issues irrelevant their motion to dismiss. Whether or not plaintiffs will ultimately prevail on their claims is not at issue in a motion to dismiss. *Scheuer v. Rhodes*, *supra* at 236. Plaintiffs are entitled to all inferences in their favor and the court must accept as true all material allegations in the complaint as well as the reasonable inferences that can be drawn from those allegations. *Patreto*, *supra* at 699. A court may not dismiss a claim unless there are no questions of fact involved considering all evidence in the light most favorable to the party opposing the motion. *SEC v. Sands*, *supra* at 1165.

2. Wong's free exercise of religion was substantially burdened by defendants' conduct.

Wong is the Matriarch of the Tao Heritage and the leader of the Wu Wei Tien Tao Association. 1st Am Compl, ¶ 3. As the spiritual leader of of Wu Wei Tien Tao Association and Chong Hua Sheng Mu Gong, Wong was compelled to leave the country to fulfill her religious obligations when her predecessor passed away. *Id.*, ¶13. Because of the extreme urgency of the situation and her religious obligations, Wong was forced to leave the United States without advance parole while her application for adjustment of status was pending. *Id.*, ¶14. Wong was unable to obtain advance parole prior to her departure. *Id.* Upon her return to the United States, she was subjected to expedited removal. *Id.*, ¶¶ 19, 24. But for her departure, necessitated by her strong religious tenants and obligations, defendants would have had no basis to deem Wong's application for adjustment of status abandoned or subject her to expedited removal.

Forcing Wong to choose between fulfilling her duties as a spiritual leader by accompanying her predecessor's body back to Hong Kong and abandoning her application for adjustment of status or, worse yet, subjecting her to expedited removal substantially burden Wong's free exercise of religion. Wong was put in the untenable position of abandoning her mandatory religious obligations or violating immigration regulations by leaving the country without advance parole. Paragraph 13 of Plaintiff's First Amended Complaint could not be more

1 clear that Wong acted on her strongly held religious beliefs by leaving the country. Because she
 2 acted on her beliefs and obligations as the inheritor of the Tao Heritage she was deemed to have
 3 abandoned her application for adjustment of status and subjected to expedited removal. Such an
 4 application of the immigration laws substantially burdens Wong's free exercise of religion by
 5 forcing Wong to choose between her religious beliefs and obligations and accepting the benefits
 6 of continued residency in the United States.

7 Moreover, Wong, as the selected Matriarch of the Tao Heritage, is the heavenly mandated
 8 successor to continue the unbroken lineage of the ancient Tao Heritage. She is irreplaceable.
 9 Wong, as the leader of the Wu-Wei Tien Tao Association, has being denied her right to be in the
 10 United States to perform her duties which are essential to the proper functioning of the
 11 Association and Sheng Gong, which has had serious consequences for the Association and Sheng
 12 Gong. *Id.*, ¶ 26.

13 Defendants' conduct of strip searching Wong and incarcerating her without providing her
 14 with a vegetarian diet substantially burdens Wong's free exercise of religion as well. Plaintiff's
 15 First Amended Complaint alleges that Wong "committed herself to a lifetime purity vow of
 16 celibacy." but for her departure necessitated by her strong religious tenants and obligations. 1st
 17 Am Compl, ¶ 27. Plaintiffs' also allege that Wong made "a lifetime vow of vegetarianism" and
 18 that defendants failure to accommodate her vegetarian diet "interfered with the practice of her
 19 faith." *Id.*, ¶ 22. Finally, plaintiffs allege that defendants conduct described herein substantially
 20 burdened plaintiffs' exercise of religion. *Id.*, ¶ 47. Allowing plaintiffs all reasonable inferences,
 21 the court must accept that being subjected to strip searches and being denied vegetarian food
 22 substantially burdened Wong's free exercise of religion.³

23
 24 ³ No reasonable person would deny that being forced to choose between eating or
 25 adhering to one's religious practice, has a coercive effect on an adherent's free exercise as set
 26 forth in by the United States Supreme Court in *Thomas v. Indiana Employment Sec Div*, 450 US
 at 717-718. In fact, prior to *City of Boerne v. Flores*, the 9th Circuit already determined that a
 prison's food policy depriving a Orthodox Jewish plaintiff of Kosher meals was a substantial

For all of the above reasons, plaintiffs' allegations clearly plead a RFRA claim for Wong.

3. Wu Wei Tien Tao & Chong Hua Sheng Mu Gong's free exercise of religion was substantially burdened by defendants' conduct.

Depriving Wu Wei Tien Tao Association and Chong Hua Sheng Mu Gong of their spiritual leader substantially burdens their free exercise of religion. Plaintiffs assert that the presence of Wong in the United States to perform her duties is "essential to the proper functioning of the Association and Sheng Gong, which has had serious consequences for the Association and Sheng Gong." *Id.*, ¶ 26. In removing Wong from the country and subjecting her to the treatment described in the complaint, the Wu Wei Tien Tao Association and Chong Hua Sheng Mu Gong were denied their rights to practice their religion. *Id.*, ¶ 28. Moreover, plaintiffs have plead that defendants conduct substantially burdens plaintiffs free exercise of religion. *Id.*, ¶ 47. Accepting these statements as true as to the associational plaintiffs, plaintiffs' RFRA claim is adequately plead and survives a motion to dismiss.

**D. THE COURT HAS SUBJECT MATTER JURISDICTION UNDER
THE DECLARATORY JUDGMENT ACT
OVER PLAINTIFFS' THIRD CLAIM FOR RELIEF**

Plaintiffs have previously addressed defendants' assertions that the court has no subject matter jurisdiction to issue a declaratory judgment ordering defendants to adjudicate Wong's adjustment of status application under section 245(i). The crucial issue here is that Beebe's letter stated that Wong did not qualify under sections 245(a) or (c) and therefore was ineligible for an adjustment, while completely ignoring provision 245(i). Under 245(i), Wong was eligible for relief on a discretionary basis. There is no evidence in the record that anyone exercised discretion in the consideration of Wong's application. The only evidence is the misapplication of two irrelevant provisions and a determination of ineligibility based on that misapplication. Wong

burden on the free exercise of his religion. *Ashelman v Wawrzaszek*, 111 3Fd 674, 678 (9th Cir 1997).

1 has the right to have the INS use their discretion in making the adjustment of status decision, not
 2 to merely find her ineligible due to irrelevant provisions.⁴

3 Defendants' argument that the court should not exercise its discretion to hear the
 4 declaratory judgment claim in this case is misplaced at this stage of the proceedings. *See* Defs'
 5 2nd Dism Memo, p 5. Such an argument addresses the merits of plaintiffs' claims and is
 6 irrelevant to a motion to dismiss.

7 **D. CONCLUSION**

8 For all of the foregoing reasons, defendants' dismissal motion should be denied in its
 9 entirety.

10 DATED this 19th day of November 2001.

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 13 TOM STEENSON
 14 BETH CREIGHTON
 15 Of Attorneys for Plaintiffs
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25 ⁴ Of course, consistent with plaintiffs' RFRA claim, plaintiffs believe the INS would
 26 further violate the RFRA if it exercised its discretion and failed to adjust Wong's status in her
 favor.

CERTIFICATE OF SERVICE

I hereby certify that I telefaxed (202 / 616-9366) and mailed a true copy of the foregoing memorandum to Christine A. Bither, attorney for defendants, addressed to her Washington, D.C., office address on this date.

DATED this 19th day of November 2001.


BETH CREIGHTON
Of Attorneys for Plaintiffs